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A FUGITIVE FROM THE CAMP OF THE CONQUERORS:  
THE REVIVAL OF EQUAL SOVEREIGNTY DOCTRINE  
IN *SHELBY COUNTY V. HOLDER*

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**I. Introduction**

*“Today is a triumph for freedom as huge as any victory that has ever been won on any battlefield... It was only at Appomattox, a century ago, that an American victory was also a Negro victory. And the two rivers—one shining with promise, the other darkstained with oppression—began to move toward one another.”*

*-President Lyndon Johnson, upon passage of the Voting Rights Act (1965)<sup>1</sup>*

*“I cannot help but believe that the inevitable effect of [the Voting Rights Act] which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.”*

*-Justice Hugo Black, Partly Dissenting from the Majority Opinion in South Carolina v. Katzenbach (1966)<sup>2</sup>*

Every narrative of conquest contains at least two stories.<sup>3</sup> What the conqueror may narrate as a triumphal story of progress, the conquered would recount as the tragic defeat of a noble cause.<sup>4</sup> But defeats are sometimes only provisional, fortunes are reversed, and the victors’ most compelling accounts of justice may slip through their grasp and change sides (to borrow a phrase from Simone Weil) like a “fugitive from the camp of the conquerors.”<sup>5</sup> At least since Reconstruction, the implementation of voting rights in the United States has shuttled back and forth between two opposing narratives of conquest, embodying two different struggles for recognition: (1) the struggle for dignity and equality accorded to historically disadvantaged minorities,

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<sup>1</sup> PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965. Volume II, entry 394, 811–15. Washington, D. C.: Government Printing Office, 1966 *available at* <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650806.asp>.

<sup>2</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 360 (1966) (Black, J., dissenting).

<sup>3</sup> Ranajit Guha, *A Conquest Foretold*, 54 *SOCIAL TEXT* 96, 97 (1998) (According to Guha, “there is no conquest that has only one story to it. It is made up of at least two—one narrated by the conquerors and the other by the conquered.” ... [F]or every narrative of triumph and hope told in the conqueror’s voice there is a counternarrative of defeat and despair told by the conquered.”)

<sup>4</sup> *Id.* See also WOLFGANG SCHIVELBUSCH, *THE CULTURE OF DEFEAT: ON NATIONAL TRAUMA, MOURNING, AND RECOVERY* (2003) (Taking the examples of the American South after the Civil War, France after its defeat by Prussia in 1871, and Germany after World War I, explaining production of myths of the unworthy barbarous enemy, of the cultural superiority of the defeated, and creating narratives of revanchism and renewal, for example).

<sup>5</sup> SIMONE WEIL, *GRAVITY AND GRACE* 171 (Trans. Emma Crawford and Mario von der Ruhr) (1952, 2002). (“If we know in what way society is unbalanced, we must do what we can to add weight to the lighter scale...we must have formed a conception of equilibrium and be ever ready to change sides like justice, that fugitive from the camp of the conquerors”).

and (2) the struggle for dignity and equality accorded to states. In the case of the former, a civil war was fought to emancipate and enfranchise an enslaved population, recognition was extended through the amendment of the Constitution; these purposes were frustrated by Jim Crow laws, and once again vindicated by the passage of the Voting Rights Act (VRA).<sup>6</sup> In the case of the latter, Southern states struggled for self-determination; they were defeated in battle and conquered through Reconstruction and after years of resistance they were conquered again by federal courts and Congress,<sup>7</sup> who set about aggrandizing their power in the guise of empowering minority populations.<sup>8</sup> Despite their competing purposes, the two narratives are not particularly different in form. They both agree upon a basic chronology, the fact of oscillation, and make common gestures towards which camp could claim provisional victory and which could claim defeat at any given point.<sup>9</sup> For the most part, with intermittent bursts of violence and coercion, claims to recognition were not played out on a battlefield, but within a single constitutional order and in the framing of election laws.<sup>10</sup> Rather than pins on a battle map, the markers of victory and defeat have moved to the courts and legislatures.<sup>11</sup>

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<sup>6</sup> Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808-10. (Making a parallel argument, placing the federal enforcement of minority rights at the very heart of the Reconstruction Power, so that the 1964 Civil Rights Act, which bans discrimination in public accommodations, is not only a legitimate exercise of Congress's power to enforce the Fourteenth Amendment; it is a paradigmatic example of that power.).

<sup>7</sup> The votes for and against the Voting Rights Act were much more closely along state lines than party lines, with opposition heavily and almost exclusively concentrated in states that would be subject to the coverage formula, and which had historically belonged to the Confederacy. The states in the House of Representatives who formed solid blocs opposing the passage of the Act included were Alabama, Arkansas, North Carolina, Mississippi, and South Carolina. In the Senate it was all of those states plus Louisiana, Florida, Georgia and Virginia. See "To Pass S. 1564, The Voting Rights Act Of 1965," *available at* <http://www.govtrack.us/congress/votes/89-1965/s78>. To Pass H.R. 6400, The 1965 Voting Rights Act Of 1965" *available at* <http://www.govtrack.us/congress/votes/89-1965/h87>.

<sup>8</sup> J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999); J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in BERNARD GROFMAN & CHANDLER DAVIDSON EDS. *CONTROVERSIES IN MINORITY VOTING* 141 (1992).

<sup>9</sup> Of course, over time, the proponents within each camp might differ in the way they identify the opposing camp, ("minorities" or "federal authorities" or in the 19th century "Republicans") and even themselves ("southern Whites," "the South" or "states" or in the 18<sup>th</sup> and 20th century "Republicans"). With each side defining themselves "the People" the meaning of the Constitution is similarly divided among states' rightists and Nationalists. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1452 (1987).

<sup>10</sup> LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* 23 (2003) (in the summer of 1868, Georgia expelled 32 black representatives from their state assembly, leading Congress to place the state under military rule).

<sup>11</sup> Numerous writers have reversed Clausewitz's famous dictum to observe, that "politics is the continuation of war by other means." See e.g., MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED":

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The Supreme Court's recent decision in *Shelby County v. Holder* belongs to the second of these contending narratives.<sup>12</sup> The Court attempts to give expression to a cause that has not been able to succeed either on the battlefield or through popular representation, and found only fleeting support in constitutional doctrine. At the time the VRA was passed, it made sense, from a legislative point of view, to focus on "bad actors" (through a Section 4 "coverage formula") and to put a burden on these proven offenders to demonstrate their proposed laws would not discriminate (through Section 5's pre-clearance procedures).<sup>13</sup> Though the VRA survived a constitutional challenge,<sup>14</sup> each time it was amended,<sup>15</sup> there remained an undercurrent of discontent and an intuition, articulated through any number of constitutional provisions and quasi-constitutional arguments, that the law posed a significant intrusion on federalism and state sovereignty. Before *Shelby County v. Holder*, there remained nine states and local governments in seven other states<sup>16</sup> that were required to get permission from the Justice Department or a Federal Court before they could change any law dealing with voting. In the brief few months since *Shelby County v. Holder*, without a coverage formula, many of them have already started experimenting with laws that, if passed, will have a disparate impact on minority communities. The possibility of massive disenfranchisement through legislation and local

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LECTURES AT THE COLLÈGE DE FRANCE, 1975-76 15 (2003). Putting the matter a bit more precisely, Elias Canetti describes electoral politics after a civil war: "But the two factions remain; they fight on, but in a form of warfare which has renounced killing." Nevertheless, writes Canetti, electoral politics maintains "the psychological structure of opposing armies." ELIAS CANETTI, *CROWDS AND POWER* (Trans. Carol Stewart) 188-190 (1960, 1978). It may be noted that in some parts of the world, such as India, political candidates do not say they "run for office" they say they "fight elections"; political parties do not say they "contest" or "win" elections, they say they "take power." In the U.S. the metaphors of war and conquest are curiously missing from colloquial speech and in their place we find the softer metaphors of sport. Still, no one who has watched the zero-sum game of partisan politics in the U.S. will fail to recognize its bellicose character.

<sup>12</sup> *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2622, n.1 (2013).

<sup>13</sup> This originally applied to states that had used a discriminatory voting law or method that was in effect in November 1964. More recently, the formula was changed to key it to the situation as of 1972.

<sup>14</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterrey County*, 525 U.S. 266 (1999).

<sup>15</sup> See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314.

<sup>16</sup> The jurisdictions most recently covered by section 5 are the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, counties in California, Florida, New York, North Carolina, and South Dakota, and townships in Michigan and New Hampshire. See 28 C.F.R. pt. 51 app. at 100-01 (2009). For a complete list of jurisdictions covered by Section 5, See Civil Rights Division, U.S. Department of Justice, Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.php](http://www.usdoj.gov/crt/voting/sec_5/covered.php).

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regulations has returned for the first time since Voting Rights Act was passed in 1965. For now it is unclear how the purposes of the VRA – to prevent discriminatory laws- will be enforced.<sup>17</sup>

The Court's decision, whose narrowest focus was on the constitutionality of the pre-clearance formula in Voting Rights Act, also stood in legal terms for a broader conflict over Congress's enforcement power of the Fourteenth and Fifteenth Amendments, and in cultural terms for the expression that a state is a bearer of rights to equality and dignity. The provisional victory this time was to strike down the central provision of the Voting Rights Act – which enumerated the states required to seek federal pre-clearance. Opponents and supporters alike took note of the candor with which it took aim at past offenders, often Southern states, and for this it had been called the “Crown Jewel of the Second Reconstruction.”<sup>18</sup>

In this essay, I will argue that the real surprise in *Shelby County* was not that such large stakes would be expressed in the opinion, but that the essential core of the Act could be disposed of with reference to an obscure principle — “equal sovereignty of the states”— with little stature in the constitutional canon.<sup>19</sup> After being rejected outright in the landmark *South Carolina v. Katzenbach* (1966) decision, “equality of sovereignty” is first mentioned as a “fundamental principle” in *Northwest Austin Municipal Utility District Number One v. Holder* (Northwest Austin)<sup>20</sup> and relied upon in *Shelby County* as the rationale to strike down Article 4 of the VRA.<sup>21</sup> In relying on *Katzenbach* for its holding, the Court audaciously cites as its primary authority the very case that it is overturning. The majority's boldness in this regard has not gone unnoticed.<sup>22</sup> In Justice Ginsburg's

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<sup>17</sup> Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131 (2013),

<http://yalelawjournal.org/2013/06/07/charlesfuentesrohwer.html>; Heather Gerken, “A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach” (August 22, 2005). Harvard Public Law Working Paper No. 118. Available at SSRN: <http://ssrn.com/abstract=788067> or <http://dx.doi.org/10.2139/ssrn.788067>.

<sup>18</sup> Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1594 (2002) (describing the Act as “the crown jewel of the Second Reconstruction”). Karlan may be drawing upon President Reagan, who after resisting some of the provisions extending the act in 1982, finally signed, proclaiming the right to vote “the crown jewel of American liberties,” Reagan Signs Voting Rights Act Extension). Washington Post, June 30, 1982, SA, at 1.

<sup>19</sup> *Shelby Cnty v. Holder*, 133 S.Ct. at 2621. (“The Act also differentiates between the States, despite our historic tradition that all the States enjoy “equal sovereignty”).

<sup>20</sup> *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

<sup>21</sup> *Shelby Cnty. v. Holder*, 133 S.Ct. at 9–17.

<sup>22</sup> Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 177 (2013), <http://yalelawjournal.org/2013/06/08/fishkin.html>. (“Rather audaciously, the NAMUDNO Court

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dissent to *Shelby*, she comments that such a construction does “much mischief.”<sup>23</sup> I will argue that the doctrine, as presented and largely misrepresented by the majority, does a great deal of work for justices who have a purposive goal of giving states greater autonomy notwithstanding the strictures of the Civil War amendments.<sup>24</sup>

Like a player in a game of charades, the majority is quiet but insistent, expressive and also focused on a message. In a series of gestures that are difficult to miss even if they are silent, the court manages to do the following: (1) it mischaracterizes and misapplies a precedent, *Katzenbach*, and overturns it with no acknowledgement of this move, (2) it quietly revives and expands an older notion of “equal footing” in part by renaming it “equal sovereignty of states” and (3) it applies and inaugurates (again, without saying so) a heightened scrutiny test. In this essay, I situate the current state of these three phenomena - the line of cases regarding voting rights, the doctrine of “equality sovereignty of states,” and the level of scrutiny- by first excavating the history of the revived equality doctrine through the older idea of “equal footing,” then exploring the expressive power of this decision, and finally, by reading the Court’s likely intent regarding a future of the standard of review through a close reading of the subtlety of what precedent it does and does not rely on. The careful reading of this decision and its selective use of precedent is necessary for us to understand how a minor jurisprudence stoked carefully and patiently, can emerge fully formed in a decision of such importance and far reaching consequence.

When seen as primarily an expressive statement about federalism, it becomes clearer how it risks little and gains much. It seems to be about federalism, but there is no reference to the relevant precedents; it seems to require heightened scrutiny for states, but the reasoning is obscure. Without specifying current jurisprudence on federalism, it expresses what “ought” to be understood. The expressive function of this doctrine is its most important function.<sup>25</sup> If the doctrinal sources were obscure, its function and intention was unmistakable. The majority may be committed to particular views on

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quoted this very sentence from *Katzenbach* as support for the idea that a “doctrine of the equality of the states” exists—concealing the part about how “that doctrine applies only to the terms upon which States are admitted to the Union” behind a strategically placed ellipsis”).

<sup>23</sup> *Shelby Cnty. v. Holder*, 133 S.Ct. at 2649 (Ginsberg, J., dissenting).

<sup>24</sup> There are two kinds of dignitary harms that are possible in federal oversight of elections redressed by “equal sovereignty”: that they are targeted (and thus stigmatizing) and that they are punitive. Thus, the two critiques expressed by the *Shelby County* majority— (1) a critique of selectivity, and (2) a critique of conditionality— are already familiar parts of a narrative of conquest.

<sup>25</sup> Cass R. Sunstein, *On the Expressive Function of Law*, 44 U. PENN. L. REV.2021 (1996).

federalism, the separation of powers, and the benign racial classification in an increasingly post-racial color-blind society, in which states could once again experiment with their voting laws without Federal oversight.

## II. “Equal Sovereignty of States”: An Equivocal Doctrine

### 1. The Equality of States: Built on Air?

Within hours of the publication of the *Shelby* decision, commentators were scratching their heads over the reasoning for the result, specifically Justice Roberts’s invocation of “equal sovereignty of the states” which he calls a “fundamental principle.”<sup>26</sup> Richard Posner countered that “there is no such principle... it does not exist,” calling the doctrine an act of “conservative imagination” and emphasizing that it is “built on air.”<sup>27</sup> Another commentator called the doctrine “the Chief Justice’s invention”<sup>28</sup> and even the most thorough scholarly account of the doctrine, locating its pedigree in “equal footing doctrine,” still concludes that the Chief Justice’s version is a “non-existent principle.”<sup>29</sup>

Of all the purposes and principles that could be served, the emphasis “equality of states” was an eccentric one. But seeing that the court was bent upon creating such a doctrine, what is its function? The court consolidated gains in more difficult battles, and recovered ground from past defeats, by smuggling its concerns on the back of a relatively obscure doctrine the “equal footing doctrine” whose scope and purpose is limited, one that originally expressed the ideal by which states previously excluded from full membership within the Federal system would become participants. In *Shelby*, the dignity of the state is offended by being treated differently by the Federal government from other states. Fundamentally, this is not a

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<sup>26</sup> “There is also a “fundamental principle of equal sovereignty” among the States, which is highly pertinent in assessing disparate treatment of States.”

<sup>27</sup> Richard Posner, SLATE.com (“This is a principle of constitutional law of which I had never heard—for the excellent reason that...there is no such principle.”).

<sup>28</sup> See e.g., Paul Abrams, “The Fifteenth Amendment Trumps the Tenth Amendment on Voting Rights,” Huffington Post, July 1, 2013, [http://www.huffingtonpost.com/paul-abrams/the-Fifteenth-amendment-trumps\\_b\\_3527256.html](http://www.huffingtonpost.com/paul-abrams/the-Fifteenth-amendment-trumps_b_3527256.html). (“But Equal Sovereignty is the Chief Justice’s invention. It is not in the Constitution and, if anything, the structure of the Constitution and the make-up of the government it created show that there was no intention to accord states equal sovereignty”).

<sup>29</sup> Zachary S. Price, *NAMUDNO’s Non-Existent Principle of State Equality*, 88 N.Y.U. L. Rev. Online 24 (2013), [http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-88-1-Price\\_0.pdf](http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-88-1-Price_0.pdf).

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controversy “between states” but remains one of unequal treatment by Federal law. Thus, though it still implicates federalism, more than any previous claims about “state dignity”.<sup>30</sup> But more than equal dignity, or even “equal footing,” the goal was to establish the equivalent of an “equal protection” analysis that could be applied to states. Once the generic invocation of “equality” is made, the problem becomes one whose implicit structure could draw upon equal protection analysis. We will return to the attempts to create such a broad principle in a moment. First, we must understand the narrower “equal footing” doctrine and the reasons such a doctrine never took root in relation to voting rights issues.

Is it correct to say, with Judge Posner, that the equal sovereignty of states is a constitutional principle, which simply “does not exist”? Though text and original intent disfavor the very existence of an equal footing doctrine, and Congress's power to admit states and determine the conditions for their admission has generally been broad, the equal footing doctrine emerges as a minor jurisprudence –beginning with *Pollard's Lessee v. Hagan* (1845)<sup>31</sup> and ending with *Coyle v. Smith* (1911)<sup>32</sup> to apply certain limits to Congress in this narrow area.<sup>33</sup> Under the “equal footing” doctrine, the Supreme Court has held that Congress cannot impose conditions on a state's entry that would place that state on an unequal footing with the existing states. The narrow reading was confirmed by *Katzenbach*, but has now been broadened considerably by *Northwest Austin* and *Shelby County v. Holder*.

First, the principle of state equality has not existed in constitution, but in a different kind of tradition. There is, instead a much narrower concept embodied in that the several states are equal in sovereignty and entitled to equal treatment under the Constitution and that no state may be admitted to the Union under more restrictive conditions.<sup>34</sup> The crucial question is not

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<sup>30</sup> Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE at 175, citing Transcript of Oral Argument at 41-42, *Shelby Cnty. v. Holder*. In the sovereign immunity context, the doctrine of state dignity was delineated by the Court in *Alden v. Maine*, 527 U.S. 706 (1999). See also Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV., (Mar., 2003) pp. 1-107.

<sup>31</sup> *Pollard v. Hagan*, 44 U.S. 212 (1845).

<sup>32</sup> *Coyle v. Smith*, 221 U.S. 559 (1911).

<sup>33</sup> Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004) at 125. See *Debates in the Federal Convention 1787* which Framed the Constitution of the United States of America Reported by James Madison (Gaillard Hunt & James Brown Scott eds., 1999) at 487-88.

<sup>34</sup> A more detailed account of non-existent doctrine and the actual doctrine of equal footing Zachary Price, *Shelby County v. Holder: The Voting Rights Act Doesn't Need to Treat States Equally*, SCOTUSBLOG (Feb. 16, 2013, 2:23 AM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-the-voting-rights-act-doesnt-need-to-treat-states-equally/>.



whether there is equality between states, but whether there is a tradition of deference to the states in certain matters. There was, until the Reconstruction Amendments, a tradition of this sort, despite the fact that such a principle cannot be located in the text of the Constitution or original intent of the framers. Indeed, the framers at the Constitutional Convention took care to remove “a provision that would have required all new states to be admitted on an equal footing with the original states.”<sup>35</sup> The doctrine finds no home in the text of the constitution, though it is rhetorically allied to or the Articles of Confederation.<sup>36</sup> Section 3 Article IV of the United States Constitution, the Tenth Amendment and in constitutional principles.<sup>37</sup> It also has to be understood in light of the Reconstruction Amendments that limited and contextualized its application throughout and after the Civil War. These Articles and Amendments did not form a unified doctrine but played off of each other at different historical periods, just as they do today. Article IV says each state will have “a republican form of government.” This can be read as a guarantee to the states that they may govern themselves without excessive interference from the national government, or a requirement of a minimal standard of government and participation guaranteed by the Federal government against the states.<sup>38</sup> At the time of the ratification of the Constitution, including its Tenth Amendment, enumerated powers were granted from the states to the federal government. These include Article I, Section 8, where Congress’s powers are enumerated. According to Madison, the Tenth Amendment is a truism, but added to restate the logic of the document as a whole.<sup>39</sup> Even so, with each subsequent amendment,

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<sup>35</sup> Biber *supra* note 33; the Debates *supra* at note 33.

<sup>36</sup> *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867) (footnote omitted).

<sup>37</sup> Justice Kennedy specifies the name of the doctrine in the oral arguments to *Shelby* (“I don’t know why under the equal footing doctrine it would be proper to just single out States by name, and if that, in effect, is what is being done, that seemed to me equally improper”). Equal footing requires that “new states since admitted [to the Union be afforded] ... the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders.” In *Pollard v. Hagan*,” the Supreme Court applied the equal footing doctrine to hold that newly admitted states acquired title to the riverbeds of all navigable waterways within their boundaries.’ *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867) (footnote omitted). (Arguing “the foundation of the equal footing doctrine is the tenth amendment”)

<sup>38</sup> According to William M. Wiecek, “The guarantee clause is unique in that it is the only restriction in the federal Constitution on the form or structure of the state governments. It empowers the federal government to oversee the organization and functioning of the states. It authorizes Congress and, perhaps to a lesser extent, the President and the Supreme Court to superintend the acts and the structure of the state governments and to inhibit any tendencies in a state that might deprive its people of republican government. Such a broad potential is rooted in the vague and unqualified wording of the clause.” William M. Wiecek, *The Guarantee Clause*, 210 *COLUM. L. REV.* 525, 537 (1972) Felix Frankfurter, “*Some Reflections on the Reading of Statutes*,” 47 *COLUM. L. REV.* 525, 537 (1947) (calling the clause “a sleeping giant”).

<sup>39</sup> *United States v. Darby*, 312 U.S. 100, 124 (1941). “While the Tenth Amendment has been characterized as a ‘truism,’ stating merely that ‘all is retained which has not been surrendered,’

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particularly the Reconstruction Amendments, the logic, and the content of those enumerated powers, and those reserved to the states, changes. Also throughout this period, less sweeping changes are made through the judicial articulation of constitutional doctrine.

**2. Equal Footing: From the First Reconstruction to Revival in  
Coyle**

If in the modern period, as seen in a case like *Shelby County*, federalism concerns were fought between the Tenth Amendment (which seeks to protect the sovereignty of states by preserving their rights of self-government) and the Fifteenth Amendment (gives Congress authority to pass laws to end the denial of voting rights based on race), federalism concerns were fought out on different plane. Before the passage of the Fifteenth Amendment, some of these concerns were embodied in a tension between the Congress's power to "Guarantee a Republican Government" and a state's "right" to be admitted on an equal footing to those who came before it. In the nineteenth and early twentieth centuries, the narrow "equal footing" doctrine soon became central to how courts interpreted and conditions imposed on state admission by Congress.<sup>40</sup>

Imposition of particular burdens on a minority of states by a democratic majority is not a problem from the point of view of democratic theory. The basis for the legitimacy of the VRA is on surer ground than the imposition of the Fourteenth Amendment on a South, the imposition of the Constitution on new states formed out of the territories, or the imposition of the Constitution on later generations.<sup>41</sup> These were the problems of the nineteenth century of which the equal footing doctrine was one small part.

The not-quite-constitutionalized Equal Footing doctrine, as definitively articulated in *Coyle* (1912) states that Congress cannot constitutionally impose a condition on the admission of a state that "otherwise would be outside Congress's power to legislate for any other state."<sup>42</sup> The Supreme

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[citing *Darby*], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975). This policy was effectuated, at least for a time, in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

<sup>40</sup>Biber, *supra* note 33 at 200-08.

<sup>41</sup> Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Northern-Only Constitutional Authorship and Neglected Reconstruction History* (August 28, 2013). Available at SSRN: <http://ssrn.com/abstract=2317471>.

<sup>42</sup> *Coyle*, 221 U.S. at 573-74.

Court had developed the equal footing doctrine to address a particular problem. Congress has constitutional authority to admit new states to the Union and even has the power to impose conditions towards statehood. The problem would arise if it could impose any condition it liked on the admission of a new state it might use that power to create second-class states. While the term “second-class states” may hold rhetorical significance for states who feel they are differentially burdened by Federal regulation, the concept originally embodied the literal possibility of sub-states or pseudo-states being carved out of existing states or Western territories. These would, in effect, be held as “conquered provinces” available for plunder by Federal authorities and existing states. This fear of “leveling down” animated the equal footing doctrine. As it happened however, the usual pattern was imposing requirements for statehood that the state provide meaningful republican form of government, which can be seen as “leveling up.” There were also demands of loyalty (from the South) and conformity (from the West), but these too were seen in the light of “guarantee of Republican form of government.” These concerns are evident in two antebellum cases: one involving New Orleans ordinance that allegedly violated the religious liberties requirement of the Louisiana Enabling Act,<sup>43</sup> and another case involved the enforceability of the ban on slavery in the Northwest Ordinance.<sup>44</sup> More typically, though, the doctrine concerned more practical concerns where Federal jurisdiction was uncontroversial. Except for the two mentioned above, every “equal footing” case that reached the Supreme Court until *Coyle v. Smith* involved public lands, navigation of waterways, or Indian affairs.

The rhetoric of “second-class states” resonates with those in the South who believe they are continually subject to selectivity and conditionality. By some accounts, prior to the Civil War, “federalism became the foundation of the ‘equal footing’ doctrine, which protected slavery’s expansion.”<sup>45</sup> During the Reconstruction period, however, the doctrine was nowhere in sight. Prior to the Civil War, Equal Footing was not yet constitutionalized but Congress also did not explore take full advantage of its powers. It was eclipsed at the

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<sup>43</sup> *Permoli v. City of New Orleans*, 44 U.S. 589 (1845).

<sup>44</sup> *Strader v. Graham*, 51 U.S. 82 (1850).

<sup>45</sup> George William Van Cleve, “Founding a Slaveholders’ Union 1770-1797,” in JOHN CRAIG HAMMOND, MATTHEW MASON, EDS., *CONTESTING SLAVERY: THE POLITICS OF BONDAGE AND FREEDOM IN THE NEW AMERICAN NATION*, 124 (2011). (Claiming “federalism became the foundation of the ‘equal footing’ doctrine, which protected slavery’s expansion.”) (Application of Jeffersonian philosophy “that new territories and states should enter the union on an equal footing with the original states. Because each new jurisdiction had the right to decide its own political fate, it could not be dictated to by Congress on an issue such as slavery.”) One might wonder then if the Reconstruction Amendments might have abolished the equal footing doctrine completely.

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time of Reconstruction, and when it was, disparate treatment was necessary.

Amendments adopted to end discrimination against freed slaves, concentrated in one region of the country, and the adoption of these amendments may have compromised the full participation of the states particularly subject to the amendments. After the Civil War and attempts to implement voting rights through ordinary legislation (or military orders), the Reconstruction Amendments were expressly designed to limit state sovereignty, granting Congress vast new power at the direct expense of the states.<sup>46</sup> And not just any states. While they took cognizance of the fact that Northern and Border States also attempted to disenfranchise Black voters, the most forceful implementation as well as resistance was located in the Southern States. In the First Reconstruction Act (1867), Congress refused to re-admit the former Confederate states into the Union unless they amended their constitutions to allow male citizen suffrage regardless of “race, color, or previous condition.”<sup>47</sup> They further prevented states from amending their constitutions to deprive these citizen of the right to vote.”<sup>48</sup> The “equal footing doctrine” did not bar these conditions to re-entry to the Union. During the Civil War and Reconstruction, admission conditions were used by the Republican Party in an attempt to shape suffrage and citizenship rules to guarantee black suffrage (and Republican political power) in both Western and Southern states.”

Instead it retreated into the larger narrative of states’ rights and failed to prevent Congress from imposing conditions on states for readmission to the Union. As an early historian of the Fifteenth Amendment stated in 1909 (just before the *Coyle* decision), before the Fifteenth Amendment’s passage, voting rights were on thin ground because of a broad, if somewhat vague, theory of state equality: “fear was freely expressed however that the *theory of the*

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<sup>46</sup> *Fitzpatrick v. Bitzer* (1976) that the enforcement clause of the Fourteenth Amendment allowed Congress to abrogate a state’s Eleventh Amendment immunity from suit in federal court. The Court in that case said that the federalism concern, Eleventh Amendment immunity, was no concern at all, because the Fourteenth Amendment was designed to limit state sovereignty. If the Fourteenth Amendment allows Congress to work around the federalism concern of the Eleventh Amendment, surely it allows Congress to work around the federalism concern of the Tenth Amendment and Article IV.

<sup>47</sup> First Reconstruction Act (An Act to Provide for the More Efficient Government of the Rebel States) ch. 153, 14 Stat. 428 sec. 5 (1867).

<sup>48</sup> An Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida to Representation in Congress, ch. 70, 15 Stat. 73. (1868); An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868); An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870).

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*equality of the states was too deeply rooted in our constitutional system* ever to make the observance of such a condition practically enforceable.”<sup>49</sup> Thus the Fifteenth Amendment was expressly designed to supply “a new basis for the continuance of congressional control over the suffrage conditions of the Southern States. This basis could be surely and safely supplied only by means of a new grant of power from the nation in the form of a suffrage amendment to the Constitution which should contain the authorization to Congress to enforce its provisions.”<sup>50</sup> The articulation of “state equality,” however, was specifically overridden during the passage of the Reconstruction Amendments, and in any case has failed to take root beyond the narrow concern of the admission of states. In neither case did the Court ask whether Congress had treated similarly situated states differently; it simply asked whether Congress had exercised a valid federal power.<sup>51</sup>

This contending principle of equality, the very one the Fifteenth Amendment was expressly introduced to displace, was not one “between states,” except in the sense that the Federal government was seen as acting on behalf of sectional interests in enforcing its mandates on certain states.

The readmission of the Southern states was attached to a number of significant conditions, including the ratification of the Fourteenth Amendment, and a requirement that the suffrage of all state citizens who had voting rights under the Reconstruction state constitutions—which provided for black suffrage<sup>52</sup> never be abridged. Three of the Southern states were given additional conditions: a requirement that blacks not be excluded from public office,<sup>53</sup> and a requirement that the states not reduce any rights blacks might have to public education under their existing Reconstruction constitutions. This requirement was in part prompted by the Georgia

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<sup>49</sup> JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 18 (1909).

<sup>50</sup> *Id.* at 21.

<sup>51</sup> In *United States v. Sandoval*, the Court upheld admission conditions designating certain areas of New Mexico as Indian country because such action was “within the regulating power of Congress.” In *Stearns v. Minnesota*, the Court upheld admissions conditions requiring the state to preserve certain tax breaks on federal land ceded to the new state, because those conditions could just as well have been imposed in a land cession to any other state.

<sup>52</sup> First Reconstruction Act, ch. 153, 14 Stat. 428 (1867); An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida to Representation in Congress, ch. 70, 15 Stat. 73. (1868); *see also* An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868).

<sup>53</sup> An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 63 (1870); *see also* An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 68 (1870); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 81 (1870).

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legislature's regression after readmission to exclude of all black legislators since the state constitution did not explicitly give blacks the right to hold public office. Georgia's action led to its continued exclusion from Congress and the threat of a re-imposition of military rule, until the state legislature backed down and readmitted the black legislators, as well as excluding legislators who could not pass the test oath requirements.<sup>54</sup> Congress also required Georgia to ratify the Fifteenth Amendment in order to be readmitted.

Clearly, undeterred by any notion of "equal footing" Congress believed self-government could be revoked or withheld when believed that the residents of the territory could not be trusted with self-government. The analogy to conquest is not inappropriate when put alongside non-Reconstruction examples: the only other significant example of Congress restricting self-government for future states was in the territory of Utah from the 1870s through 1890s. In addition, New Mexico and California were both governed for a few years by military governments after their conquest in the Mexican War, and both Orleans and Florida was governed briefly by the military after their purchase.<sup>55</sup>

The fact that Southern states were both targeted and coerced is not only a part of the narrative of the Conquered. Defenders of the process by which the Reconstruction Amendments passed are unapologetic about its necessary selectivity as well as its coercive aspect: According to Akhil Amar, aligning his defense of the Reconstruction Amendments to a more recent defense of VRA: "the Fourteenth Amendment was itself adopted by a process in which certain states were subject to a kind of selective preclearance."<sup>56</sup> In a parallel register, drawing on his peculiar notion of "higher lawmaking," Bruce Ackerman has argued that the most extraordinary departures from norms of equality would have been extra-constitutional but justifiable, as when the ratification of the Reconstruction Amendments did not conform to the process

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<sup>54</sup> See ALAN CONWAY, *THE RECONSTRUCTION OF GEORGIA* 166-190 (1966).

<sup>55</sup> See JACK ERICSON EBSER, *THE FIRST AND SECOND UNITED STATES EMPIRES: GOVERNORS AND TERRITORIAL GOVERNMENT* 17 84-1912, At 153 (1968).

<sup>56</sup> Akhil Amar, *The Lawfulness of Section 5 — and Thus of Section 5*, 126 HARVARD L. REV. FORUM 109, 113 In the very process by which section 5 and the rest of the Fourteenth Amendment were adopted, certain states with sorry electoral track records were obliged to get preapproval from federal officials in order to do things that other states with cleaner electoral track records were allowed to do automatically. But it would be preposterous to say that section 5 of the Fourteenth Amendment was itself illegal." section 5 of the Fourteenth Amendment itself unconstitutional? A mixed state of legal, political and military conquest spanned across a nine-year period from the outbreak of the War, its conclusion, the readmission of all the Confederate states, and the ratification of the Reconstruction Amendments.

prescribed by Article V, with all the states as equal participants.<sup>57</sup> Others have debated the degree to which these conformed to a valid Amendment making process. What is unmistakable, however, is that whether described in the language of constitutionalism, war or international law, there is an aspect of fait accompli.

The context was again transformed with the passage of the Reconstruction Amendments. And there are further consequences that haunt the undertaking to rejoin the Union. When, after the Civil War the states and people took the extraordinary step of Amending the Constitution, they ceded to the central government other enumerated powers, thus adding to Congress's enumerated powers, the powers to abolish and prevent slavery (XIII), enforcement of due process, and equal protection of the laws (XIV), and preventing voting rights from being denied or abridged on the basis of race or color (XV). Our understanding of the Tenth Amendment must change with each subsequent amendment, and thus among the powers ceded by the States and given to Congress. It must be admitted that this was not without coercion by the Union and resistance by the former Confederate states. Certainly with the passage of the Fifteenth Amendment, whatever residual power the states may have had over ensuring that voting rights are protected regardless of race or color, it was no longer "reserved to the states," but became a power of the central government. The Fifteenth Amendment created an additional enumerated power. "As such, it 'amended' the Tenth Amendment,"<sup>58</sup> providing Congress rather than either the States or the people, with the power to ensure that voting was neither denied nor abridged on account of race or color.<sup>59</sup> The language Section 2 of the Fifteenth Amendment *Congress shall have the power* to enforce this article by appropriate legislation mirrors precisely Article I, Section 8, where Congress's powers, are enumerated.

With the passage of the Reconstruction Amendments, the notion of a broad "equal protection" for states failed to take root, and the applicability of "equal footing" had to be construed as sufficiently narrow to allow the implementation of those Amendments.

A generation after Reconstruction, however, a narrow doctrine re-

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<sup>57</sup> BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99-119 (1998).

<sup>58</sup> Paul Abrams, "*The Fifteenth Amendment Trumps the Tenth Amendment on Voting Rights*," Huffington Post, July 1, 2013, [http://www.huffingtonpost.com/paul-abrams/the-Fifteenth-amendment-trumps\\_b\\_3527256.html](http://www.huffingtonpost.com/paul-abrams/the-Fifteenth-amendment-trumps_b_3527256.html).

<sup>59</sup> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

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asserted itself just as it was becoming increasingly obsolete. Justice Horace H. Lurton argued that: "this Union" "was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." It was developed by the U.S. Supreme Court in *Coyle v. Smith*.<sup>60</sup> At issue in *Coyle* was Congress' attempt to condition Oklahoma's admission into the Union on its agreement to locate the state capital in Guthrie and to accept certain limitations on its power to change its seat of government. Although the U.S. Supreme Court could find no constitutional language prohibiting the use of such conditions by the Congress, it "read the unwritten tradition of state equality into the Constitution."<sup>61</sup> Justice Horace H. Lurton, writing for the majority, reasoned:

[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.<sup>62</sup>

In *Coyle v. Smith*, the Court held that Oklahoma could move its state capital even though the move violated a condition in its admission statute. The "power to locate its own seat of government," the Court reasoned, is a state power, not a federal power, so Congress could not prevent Oklahoma from moving its capital after it was admitted as a state. Since the Reconstruction Acts were never challenged using Equal Footing doctrine, this remains the closest analogy to the "differential treatment" imposed by the VRA. And it is an analogy explicitly rejected in *Katzenbach*. More often, the doctrine was applied in contexts concerning the ownership of the submerged lands beneath navigable waters. Here, and sometimes to the detriment of states, are assumed to be transferred to all states upon entry into the Union, since those attributes were inherited by the original thirteen states upon independence.<sup>63</sup> This includes that even with such a doctrine, disparate treatment is fine. Here, the analogy to voting rights would be even more strained. "*Coyle* might have had serious repercussions earlier in the nineteenth century when conditional admissions had been used to guarantee conformity and compatibility among the states as well as to protect federal interests." As William Wiecek notes, the decision "cast serious doubt on one of

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<sup>60</sup> 221 U.S. 559 (1911).

<sup>61</sup> Michael C. Tolley and Bruce A. Wallin, *Coercive Federalism and the Search for Constitutional Limits*, 25 *PUBLIUS* 73 (1995).

<sup>62</sup> *Coyle v. Smith*, 221 U.S. 559, 580 (1911).

<sup>63</sup> *Pollard*, 44 U.S. at 228-29.



the most important means of enforcing Reconstruction.” But of course, the point is academic: *Coyle* came “more than a generation after Reconstruction was abandoned.”<sup>64</sup>

Perhaps traces of the equal footing doctrine remain in the Southern memory because the states were not subject to a single standard for admission as a state, but a process of readmission to the Union. The terms of admission for any of the states would have involved some degree of unequal bargaining power. Each of the territories aspiring to the benefits of statehood were subjected to conditions by an already powerful federal government. In this sense, it is unsurprising that the federal government would be able to guarantee its property interests, and impose certain limitations on state sovereignty.<sup>65</sup>

The real question of Federalism is not whether there is equality between states, but whether there is a tradition of deference to the states in certain matters, and whether the language of equality was a part of this tradition. There was, until the Reconstruction Amendments, a tradition of this sort when Congress did not explore or take full advantage of its powers. It was definitively ended at the time of Reconstruction, and when it was, disparate treatment was necessary. Amendments adopted to end discrimination against freed slaves, concentrated in one region of the country, and conditions for readmission to the Union were imposed on the states that had seceded.

Although all states have been unequal to the power of the Federal government at the time of admission (or re-admission) to the Union, the factual claim that additional burdens were placed on Southern states at the time seems clear enough. More distantly, the analogy between the Reconstruction amendments and the VRA can even be sustained. Thus, from a moral point of view, the narrative of “disparate treatment” and “denial of equal protection” make sense in a strictly colloquial sense. As a legal matter, however, as discussed below in greater detail, the application of “equal protection” or “disparate treatment” analysis *to states*, has failed time and again.

### 3. Equal Sovereignty: From Second Reconstruction to a Revival

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<sup>64</sup> Wiecek *supra* note 38.

<sup>65</sup> PETER S. ONUF, STATEHOOD AND UNION (1987); Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, 18 *PUBLIUS* 53 (1988); Peter S. Onuf, *Territories and Statehood*, in *ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 83 (Jack P. Greene, ed. 1984). Biber, *supra* note 33 at 119 (2004).

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**in Shelby County**

A century of resistance came to a legal end with the passage of the Voting Rights Act and at least the narrative of the descendants of slaves and those of the country as a whole “began to move toward one another.” But parts of the country were still recalcitrant. This recalcitrance was expressed in legal terms in *South Carolina v. Katzenbach* (1966) the court recognized the ingenious defiance of certain states,<sup>66</sup> and could not have failed to appreciate the ingenuity with which South Carolina constructed its legal challenge as well: <sup>67</sup> On the coverage formula, “they argue that the coverage formula prescribed in § 4(a)-(d): (1) “Violates the principle of the equality of States,” (2) “Denies due process by employing an invalid presumption and by barring judicial review of administrative findings, (3) Constitutes a forbidden bill of attainder, (4) Impairs the separation of powers by adjudicating guilt through legislation; and (5) “Abridge[s] due process by limiting litigation to a distant forum.”<sup>68</sup> On Preclearance, they claimed that the review of new voting rules required in § 5: (1) Infringe(s) Article III by directing the District Court to issue advisory opinions. (2) Abridge(s) due process by limiting litigation to a distant forum.” In *Katzenbach*, the court summarily dismissed most of these arguments, noting that:

A State is not a "person" within the meaning of the Due Process Clause of the Fifth Amendment; The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and, to our knowledge, this has never been done by any court.” “nor does it have standing to invoke the Bill of Attainder Clause...” or other claims “which exist only to protect private individuals or groups.”<sup>69</sup>

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<sup>66</sup> 383 U.S. 301, 328-29 (1966).

<sup>67</sup> They contend that the assignment of federal examiners authorized in § 6(b) abridges due process by precluding judicial review of administrative findings, and impairs the separation of powers by giving the Attorney General judicial functions; also that the challenge procedure prescribed in § 9 denies due process on account of its speed.

<sup>68</sup> Finally, South Carolina and certain of the amici curiae maintain that §§ 4(a) and 5, buttressed by § 14(b) of the Act, “abridge due process by limiting litigation to a distant forum.”

<sup>69</sup> 383 U.S. 323-324. These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. (“South Carolina and certain of the amici curiae also attack specific sections of the Act for more particular reasons. They argue that the coverage formula prescribed in § 4(a)-(d) violates the principle of the equality of States, denies due process by employing an invalid presumption and by barring judicial review of administrative findings, constitutes a forbidden bill of attainder, and impairs the separation of powers by adjudicating

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State of S.C. v. Katzenbach, 383 U.S. 301, 323-324 (1966)

The court takes more time with the equality claim. It would have been implausible to take the language of the equal protection clause and apply it to the equal protection of states. Located in the first section of the Fourteenth Amendment, the clause addresses states and says “no state shall...deny to any person within its jurisdiction the equal protection of the laws.”<sup>70</sup> Yet this was precisely what South Carolina attempted by citing the “equal footing doctrine.” The *Katzenbach* court called their bluff.

The Court has said time and again that racial discrimination by the states, particularly when it concerns the fundamental right to vote, violates the Constitution. The court in *Katzenbach* noted “unremitting and ingenious defiance in certain parts of the country.”<sup>71</sup> In *Katzenbach*, the state of South Carolina was also ingenious in its legal arguments. Whereas the provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution, the court noted:

South Carolina and certain of the amici curiae also attack specific sections of the Act for more particular reasons. They argue that the coverage formula prescribed in § 4(a)-(d) violates the principle of the equality of States, denies due process by employing an invalid presumption and by barring judicial review of administrative findings, constitutes a forbidden bill of attainder, and impairs the separation of powers by adjudicating guilt through legislation

Prior to this argument, couched among others, equal footing doctrine had

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guilt through legislation. They claim that the review of new voting rules required in § 5 infringes Article III by directing the District Court to issue advisory opinions. They contend that the assignment of federal examiners authorized in § 6(b) abridges due process by precluding judicial review of administrative findings, and impairs the separation of powers by giving the Attorney General judicial functions; also that the challenge procedure prescribed in § 9 denies due process on account of its speed. Finally, South Carolina and certain of the amici curiae maintain that §§ 4(a) and 5, buttressed by § 14(b) of the Act, abridge due process by limiting litigation to a distant forum. Some of these contentions may be dismissed at the outset. The word “person” in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and, to our knowledge, this has never been done by any court”).

<sup>70</sup> “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>71</sup> State of S.C. v. Katzenbach, 383 U.S. 303.

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never been the argument that “equal protection” applied to states.<sup>72</sup>

“Disparate treatment” can be challenged under equal protection analysis, which requires heightened scrutiny for laws discriminating against discrete and insular minorities. States, however, have never been the subjects of equal protection analysis. The notion that states qualify for equal protection was rejected out of hand by the court in *Katzenbach*. So was the more limited claim that states were entitled to “equal sovereignty” under the equal footing doctrine as articulated under *Coyle v. Oklahoma*, the narrow rule that new states enter the Union on an equal footing with their predecessors.<sup>73</sup> *South Carolina v. Katzenbach* confined *Coyle* to its facts, declaring that the equality rule limits Congress only with respect to the admission of states, the coverage provisions of the Voting Rights Act of 1965 were not barred by any “doctrine of the equality of States, invoked by South Carolina” “for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”<sup>74</sup> Stating that *South Carolina v. Katzenbach* has limited *Coyle* to the narrow holding that Congress must treat states equally in admitting them).<sup>75</sup>

Between *Katzenbach*<sup>76</sup> and *Shelby County*, in a period that included landmark cases both on both sides of the Federal/States rights question, the precise argument that states are entitled to equal protection never emerged in the Supreme Court’s jurisprudence. But more often than not, even for those who promote state’s rights as against the federal government, the “equality” aspect has been redundant in federalism. Some have argued that

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<sup>72</sup> Zachary S. Price, *NAMUDNO’s Non-Existent Principle of State Equality*, 88 N.Y.U. L. Rev. Online 24 (2013). [http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-88-1-Price\\_0.pdf](http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-88-1-Price_0.pdf) (“[T]he equal footing doctrine doesn’t support the idea that otherwise valid federal legislation treating states unequally is suspect”).

<sup>73</sup> The Supreme Court developed the equal footing doctrine to address a particular problem. Congress has constitutional authority to admit new states to the Union, but if it could impose any condition it liked on the admission of a new state, it might use that power to create second-class states. In other words, it might disadvantage new states by impairing their sovereignty in ways that it couldn’t have done for the old states. To prevent such discrimination against new states, the Court held that congressional conditions on a state’s admission to the Union are enforceable only if Congress could have imposed them on an existing state. So, for example, in *Coyle v. Smith*, the Court held that Oklahoma could move its state capital even though the move violated a condition in its admission statute. The “power to locate its own seat of government,” the Court reasoned, is a state power, not a federal power, so Congress could not prevent Oklahoma from moving its capital after it was admitted as a state.

<sup>74</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966).

<sup>75</sup> See e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* at 378-397.

<sup>76</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966) (upholding provision of Voting Rights Act that provides stricter review of voting laws in Southern states against challenge that it violates “equal footing” doctrine).

stands as a precedent that supports current Supreme Court jurisprudence that the federal government lacks the power to "compel the States to enact or administer a federal program."<sup>77</sup> In a couple of federalism cases, however, *Coyle* was cited, though not for the proposition of "equality of states." In other cases, state dignity has been formulated without reference to *Coyle*.

**a. *Coyle* Cited for Purposes other than Equal Sovereignty**

*Coyle* has not proved dispositive in any case up to this point "sovereign equality" was not treated as a substantive limitation upon federal power. *National League of Cities v. Usery*, famously held that federal regulation of state employee wages under the Fair Labor Standards Act intrudes so much on "traditional governmental functions" that it violates the Tenth Amendment).<sup>78</sup> (relying in part on *Coyle*).

On appeal to the Second Circuit Court of Appeals, counsel for *New York in New York v. United States*<sup>79</sup> argued that, even after *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>80</sup> the equality rule was at least one substantive limitation upon federal power, though picked up for some rhetorical flourish in her opinion for the U. S. Justice O'Connor Supreme Court, cited *Coyle*:

While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.<sup>81</sup>

-*Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911)

*Coyle* is cited here, but not for the "equality" but a broader "anti-coercion principle." Michael C. Tolley and Bruce A. Wallin have argued "Justice O'Connor had been interested in the *Coyle* doctrine for some time."<sup>82</sup>

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<sup>77</sup> Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1195-96 (1998) (arguing that *Coyle* stands as a precedent that supports current Supreme Court jurisprudence that the federal government lacks the power to "compel the States to enact or administer a federal program").

<sup>78</sup> *National League of Cities v. Usery*, 426 U.S. 833, 845-46 (1976).

<sup>79</sup> 942 F.2d 114, 120 (2d Cir 1991).

<sup>80</sup> *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528, 556, 574 (1985) (overruling *National League of Cities*).

<sup>81</sup> See *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911).

<sup>82</sup> Michael C. Tolley and Bruce A. Wallin, *Coercive Federalism and the Search for Constitutional Limits*, 25 PUBLIUS 73 (1995) (least specific of several theories attacking unequal burdens imposed by unfunded mandates).

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Apparently dissatisfied with the way the Court in Justice O'Connor set out to restore the doctrine to its pre-1966 status.<sup>83</sup>

Because of its holding limiting the power of Congress to impose conditions on newly-admitted states, it has been cited by the Supreme Court as an important example of the basic nature of state sovereignty in the federal system, and of its core, inviolable features, First cited in her dissent in *Garcia*, the equality rule of *Coyle* reappeared again, this time in her opinion for the Court in *New York v. United States*.<sup>84</sup> Although the equality rule may be more suited to evaluating the claim by states that unfunded mandates, because of their differential impact, place them on an unequal footing with other states, its use by Justice O'Connor to support her reading of the inherent state-sovereignty limitations of the Tenth Amendment...<sup>85</sup> There is simply no evidence that, simply because she took it to support her position on anti-coercion, Justice O'Connor sought to over-extend the *Coyle* doctrine to a new area, or resurrect a doctrine of equality of states.

If the court wanted to wish a doctrine into being, it might not have looked like *Coyle*. Usually the issue of “equal sovereignty” was barely on point. used unequally against states that are perceived as different or disloyal, in areas far removed from the enumerated federal powers of Article I, and to subordinate states to an overarching federal system. The Court has always entertained pluralism in this area both to the benefit and detriment of states.<sup>86</sup>

**b. Cases Implicating Equal Sovereignty but Avoiding *Coyle***

Even where *Coyle* has not been directly cited in the Court's Tenth and Eleventh Amendment jurisprudence, it bears structural similarities with arguments made.<sup>87</sup> In *Northwest Austin*, the Court, in their now-notorious dicta, cited two equal footing cases *United States v. Louisiana* and *Lessee of Pollard v. Hagan* as support for its assertions. They did not cite *Coyle*.

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<sup>83</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

<sup>84</sup> See *New York v. U.S.*, 505 U.S. 144, 162 (1992) (striking down a federal law that required states to take title to low-level radioactive waste within their borders and citing *Coyle* for the proposition that “The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions”).

<sup>85</sup> Michael C. Tolley and Bruce A. Wallin, *Coercive Federalism and the Search for Constitutional Limits*, 25 *PUBLIUS* 73, 89 (1995).

<sup>86</sup> *Skiriotes v. Florida*, 313 U.S. 69 (1941) (upholding Florida law that regulated taking of sealife by Florida residents in the high seas as part of the inherent sovereignty of all states); *Joplin Mercantile Co. v. United States*, 236 U.S. 531 (1915) (upholding a provision of Oklahoma's Enabling Act that required the state to prohibit sales of liquor to Indians).

<sup>87</sup> See e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *United States v. Lopez*, 514 U.S. 549 (1995).

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In *Northwest Austin*, the court (not yet ready to overturn *Katzenbach*) completely avoided mentioning *Coyle* as well as the term “equal footing.” And yet three other cases are cited. Even there, similarly situated states are treated alike, and those states with a different history are treated differently.<sup>88</sup>

There is no discussion of lateral “equality” among states and no suggestion that the constitution requires equal treatment of states.<sup>89</sup> *Texas v. White* simply explained how statehood was indissoluble both for Texas and earlier states, and any language suggesting equality of states is used to this purpose: “All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State... The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States.”<sup>90</sup> This description is less like sovereignty alone and more like citizenship, wherein a certain kind of equality is an aspect.<sup>91</sup>

In *Northwest Austin*, the Court, in their now-notorious dicta, cited two equal footing cases *United States v. Louisiana* and *Lessee of Pollard v. Hagan*,<sup>92</sup> but not *Coyle*, as support for its assertions. They cited a truncated passage from *Katzenbach* to overrule the actual holding in that passage of *Katzenbach*. All that remained in *Shelby* to resurrect the “equal footing doctrine” was to rely upon *Northwest Austin*, and the previously narrowed

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<sup>88</sup> *United States v. Louisiana*, 363 U.S. 1, 16 (1960) a foreign relations case regarding maritime boundaries of particular states and those of the United States as a whole.

<sup>89</sup> Texas having claimed a maritime boundary at three marine leagues from her coast when she was an independent republic prior to admission to the Union, and this boundary having been confirmed pursuant to the Annexation Resolution of 1845, Texas was entitled, under the Submerged Lands Act, to a grant of three marine leagues from her coast for domestic purposes. *United States v. States of La., Tex., Miss., Ala., & Fla.*, 363 U.S. 1, 80 S.Ct. 961 (1960) supplemented sub nom. *United States v. Louisiana*, 382 U.S. 288, 86 S.Ct. 419 (1965).

<sup>90</sup> *United States v. Louisiana*, 363 U.S. 1, 16 (1960) *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845); *Texas v. White*, 7 Wall. 700, 725–726 (1869).

<sup>91</sup> The majority would almost certainly be hostile to the importation of public international law into this area, though the concept of sovereign equality in that field is descended from a similar set of natural law doctrines. Being folded into a sovereign, the moment of statehood (some precede the nation-state and others created within its borders or designated from among its territories). Thus the problem of statehood within a federal union more neatly divides the international law two theories of recognition, called “declaratory” and “constitutive.” See HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, 2, 38–66; JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, 16–25; GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* (Noting that sovereign equality of nation-states has been qualified by the existence of legalized hegemony and anti-pluralism.).

<sup>92</sup> *United States v. Louisiana*, 363 U.S. 1, 16 (1960) (citing *Lessee of Pollard v. Hagan*, 3 How. 212, 223 (1845)); see also *Texas v. White*, 7 Wall. 700, 725–726 (1869).

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Coyle doctrine. seemed to get its notion of a tradition of state equal sovereignty from the so-called “equal footing” doctrine—The suggestion is that, in fact, equal footing case law suggests the opposite. This truncated sentence appears: “The doctrine of the equality of States ... does not bar... remedies for local evils which have subsequently appeared.”<sup>93</sup> The meaning is precisely the opposite of what Katzenbach stated and intended. By the time the *Shelby* majority reclaimed the inverted principle, they were able to claim a departure from the “fundamental principle of equal sovereignty” would require a showing that a statute’s *disparate geographic coverage is sufficiently related to the problem that it targets*.

*Northwest Austin* left the constitutionality sections 4 and 5 untouched, but smuggled in a foundational concept for the majority’s reasoning in *Shelby*. In *Shelby*, section 5 was not struck down, but striking down the section 4 coverage formula, the Court rendered section 5 inoperative. If things were getting better, was this because of section 5 or despite it? The question now is whether a world without section 5 will make evident the progress that has been made or lead to immediate retrogression. The fate of pre-clearance remains either litigation by an activist justice department using a dynamic preclearance regime rooted in bail-out and bail-in provisions, or else with Congress amending the VRA.

The majority was certainly audacious in relying upon this doctrine for their decision, but in other ways they were risk averse. While they set a path for giving legal expression to defeated doctrines of federalism, they also avoided the conventional confrontation between states’ rights and the Fourteenth Amendment. The stealth strategy meant sidelining precedents that might have provided similar arguments for states’ rights.

In this way, insofar as the Fifteenth Amendment goes, there is no constitutional principle remaining in this area. Whatever “equal sovereignty” principle is being invoked, it is already a defeated doctrine.

What remains is a very different doctrine, which is more properly a principle of equality “between states” rather than between states and the Federal government. This is how the Court, first in *Northwest Austin* (2009), and now with far greater consequences in *Shelby*, elevated an obscure and

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<sup>93</sup> Katzenbach, *supra* note 74, at 328–329: “[i]n acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.”



largely irrelevant doctrine (the “equal footing” doctrine) to a “fundamental principle” of Constitutional law. In doing so, it mischaracterized the scope, purpose, and meaning of that doctrine re-casting it as much broader principle requiring “equality of sovereigns.” Remarkably, the applicability of the doctrine took a short step from being completely rejected in *Katzenbach*, resurrected in *Northwest Austin* merely by reference to *Katzenbach*, and fully operative as a constitutional principle in *Shelby* sufficient to strike down Article 4. The court’s audacity in this regard has not gone unnoticed.<sup>94</sup>

The majority in *Shelby* relied most directly on *Northwest Austin* seemed to get its notion of a tradition of state equal sovereignty from the so-called “equal footing” doctrine. But the equal footing doctrine doesn’t support the idea that otherwise valid federal legislation treating states unequally is suspect for that reason. In *Shelby*, in addition to the equal sovereignty cases discussed in *Northwest Austin*, *Coyle* reappeared, no longer chastened by *Katzenbach*.

It is a minor jurisprudence that may prove to enter the Constitutional canon.<sup>95</sup> Like another minor jurisprudence that has emerged in recent years—the Court’s jurisprudence of “state dignity” in the context of sovereign immunity—the *Shelby* majority’s articulation of “state equality” has an expressive function.<sup>96</sup> It is expressive of the same broader views on the equality of states with the Federal government—the values that lost constitutional protection with the Fifteenth amendment, “dignity” concerns, the losing arguments in Tenth Amendment jurisprudence—all smuggled in on the back of a relatively obscure doctrine.

I argue here that the court dug into a past battle that had been lost and copy-pasted a discredited strand of Tenth Amendment jurisprudence in this new context. The language of equal sovereignty is borrowed from a limited doctrine, but its underlying principles are copy-pasted from a discredited strand of Tenth Amendment jurisprudence, and the aspirations

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<sup>94</sup>Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 177 (2013), <http://yalelawjournal.org/2013/06/08/fishkin.html>. (“Rather audaciously, the *Northwest Austin* Court quoted this very sentence from *Katzenbach* as support for the idea that a “doctrine of the equality of the states” exists—concealing the part about how “that doctrine applies only to the terms upon which States are admitted to the Union” behind a strategically placed ellipsis.”)

<sup>95</sup>J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 HARVARD L. REV. 963 (1998); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon* 17 CONSTITUTIONAL COMMENTARY 295 (2000)

<sup>96</sup>Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

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and resentments that animate it are pulled from that earlier confrontation, just as the folk wisdom of the court seems to recycle rhetoric from other lost battles in American history: the defense of Jim Crow laws, resentment against reconstruction, and even efforts to prop up slavery before the Civil War.<sup>97</sup>

The difference here is that none of those earlier struggles is likely to be fought again. But the decision in *Shelby* may just be a prelude to resurgence in Tenth Amendment jurisprudence reinvigorating the concepts of dignity and equality of sovereign states. According to Peter Onuf, “the conditions do not seem to have engrained themselves too deeply in the minds of the people of the states in question, or their historians for that matter... In the longer historical perspective the conditions appear to have faded into memory—even in the South, the ire of “Redeemers” appears to have been focused on the substantive issues of black suffrage and civil rights (and the Fourteenth and Fifteenth Amendments that enshrined these principles), rather than the fact that these requirements were also imposed through the readmission conditions.”<sup>98</sup>

It is the states that can vindicate the rights of the individual is not new and it was articulated from the Federalist Papers to National Federation of *Independent Business v. Sebelius* (2012).<sup>99</sup> In the Tenth Amendment, reserving powers to the states was seen as a truism, but one that seems to have linking the states to “the people” seems to have had more of an afterlife than any other handwritten afterthought. There are legalist and populists

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<sup>97</sup> JAMES RONALD KENNEDY AND WALTER DONALD KENNEDY, *THE SOUTH WAS RIGHT!* 174 (The authors of this neo-confederate text lump the “the punitive Southern-only” Voting Rights Act with other familiar charges of barbarity, hypocrisy, and infamy by the North, and by extension the post-bellum Federal republic).

<sup>98</sup> Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, 18 *PUBLIUS* 53 (1988); William A. Dunning, “Are the States Equal Under the Constitution?” 3 *POLITICAL SCIENCE QUARTERLY* 425-453 (1888).

Chief Justice Roberts articulated this view of federalism in *National Federation of Independent Business v. Sebelius*, 567 U.S. 4 (2012) (Stating that “State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” quoting *Coleman v. Thompson*, 501 U. S. 722, 759 (1991) *New York v. United States*, 505 U. S. 144, 181 (1992) (internal quotation marks omitted) Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which “in the ordinary course of affairs, concern the lives, liberties, and properties of the people” were held by governments more local and more accountable than a distant federal bureaucracy. *THE FEDERALIST* NO. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011).

strands of this movement, and they sometimes converge. There have been legal arguments as well as purely expressive ones emanating from movements which going back over a hundred years have gone by names such as “Redeemers” “Lost Cause” “Neo-Confederate,” “Dixiecrats,”<sup>100</sup> “Southern Strategy,” “Tenthers” or “Constitution in Exile.” Taken together, these are not only exotic extremists, but also mainstream legal scholars and ideologically-driven legislators (including those who have introduced “Tenth Amendment Resolutions” in state legislatures). Carrying with them the torch of liberty (the kind favored by libertarians as well as states’ rights advocates) they arrive at arguments that range from moderate constitutional balancing to threats of secession. What the *Shelby County* decision signals may be slightly different from what it accomplishes as precedent or as guidance to Congress, but it is no less significant.

## II. EXPRESSIVE HARMS: CONDITIONALITY AND SELECTIVITY

As much as *Shelby* hinders the future implementation of the Voting Rights Act, it also serves an expressive function. Along with interpreting the law, it is also concerned with “making statements” of a more general nature.<sup>101</sup> Some have argued these statements are empty gestures, based on nothing more than nostalgia for states’ rights,<sup>102</sup> like a sub-genre of Lost Cause literature, equal parts propaganda and self-delusion, but it is worth taking notice that through a combination of pragmatism and expressivity, the Court managed to eviscerate the most effective legislation devised in the civil rights era.

According to Fishkin, the possible “dignitary harm” in the VRA, pre-clearance, and the coverage formula “lies in treating the South—the former Confederacy—differently from most of the rest of the states in a particular way that carries with it the implication that the past is not dead.” Moreover, he argues, “federal oversight” carries with it a “faint echo especially in its

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<sup>100</sup> RONALD STORY AND BRUCE LAURIE, ED. *THE RISE OF CONSERVATISM IN AMERICA, 1945–2000: A BRIEF HISTORY WITH DOCUMENTS* 39 (2008). (Point Four of the 1948 platform of Strom Thurmond’s “States’ Rights Democratic Party”—the Dixiecrats— weaves together the public and private in a seamless and visible whole: “We stand for the segregation of the races and the racial integrity of each race; the constitutional right to choose one’s associates; to accept private employment without governmental interference, and to earn one’s living in any lawful way. We oppose the elimination of segregation, the repeal of miscegenation statutes, the control of private employment by Federal bureaucrats called for by the misnamed civil rights program. We favor home-rule, local self-government and a minimum interference with individual rights.”).

<sup>101</sup> Cass R. Sunstein, *On the Expressive Function of Law*, 44 U. PENN. L. REV. 2021 (1996).

<sup>102</sup> Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 177 (2013).

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geographic outline of Reconstruction itself.”<sup>103</sup> The expressive harm here is suggested by Justice Roberts in his statements and dicta. It is also addressed by the revival and extension of the equal footing doctrine as one that insists upon the “equality and dignity in power” among the several states. Opponents of the coverage formula struck down in *Shelby* argued that it was targeted and punitive, invoking a longer history of conquest. Defenders of the formula were more divided, arguing that it was (1) targeted but not punitive, (2) neither targeted nor punitive, or (3) targeted and punitive but perfectly constitutional. I take the third of these views. In truth, particular states were conquered at least three times: by arms, by constitutional amendment, and by legislation, and the courts and legislatures remain viable options for resistance. Even if other states were swept in from time to time (such as those with linguistic minorities), it remained the states that belonged to the former Confederacy who were unable to demonstrate sufficient commitment to equality in order to bail out of the preclearance regime. Insofar as the formula stigmatized certain states, this was not entirely unintended either. In my view, it is not helpful to deny or repress the violence that brought us to this point, and led both to opposite results by the two branches. It was out of a conviction that selectivity carried some moral weight that Congress extended the Act without revising the coverage formula, while the court’s majority acted out the conviction that they were vindicating certain counterclaims to justice, even against the proper reading of the law.

Over the years, section 5 in particular attracted a great deal of admiration as well as controversy. The supporters of section 5 have a normative commitment to the purpose that was rearticulated in 2006 when the section was amended to clarify that the proposed laws must not have either the intent or the effect of “diminishing the ability of any citizens of the United States” because of race, color, or membership in a language minority group defined in the Act “to elect their preferred candidate of choice.”<sup>104</sup> Congress’s power to act vigorously in this area has been reaffirmed over the years.<sup>105</sup> Opponents of the section have had a more eclectic grab bag of

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<sup>103</sup> *Id.*

<sup>104</sup> 42 U.S.C. 1973c (b) & (d). See also FEDERAL REGISTER / Vol. 76, No. 27 / Wednesday, February 9, 2011. *Notices U.S. Department of Justice Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act* [http://www.justice.gov/crt/about/vot/sec\\_5/sec5guidance2011.pdf](http://www.justice.gov/crt/about/vot/sec_5/sec5guidance2011.pdf).

<sup>105</sup> *Georgia v. United States*, 411 U.S. 526, 535 (1973) (reaffirming that “the Act is a permissible exercise of congressional power under § 2 of the Fifteenth Amendment”); *City of Rome v. United States*, 446 U.S. 156, 183 (1980) (explaining that “we have reaffirmed our holdings in *South Carolina v. Katzenbach* that the Act is ‘an appropriate means for carrying out Congress’ constitutional responsibilities’ and is ‘consonant with all . . . provisions of the Constitution’”) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) ); *Lopez v. Monterrey County*, 525 U.S. 266, 283 (1999) (reaffirming that “Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in

arguments, ranging from disapproval of the ways section 5 has enabled the creation majority-minority districts, to the idea that just because states once acted in a particular way, it does not mean they will in the future. *Northwest Austin* set out “two principal inquiries”: (1) whether the “current burdens” imposed by section 5 “are “justified by current needs” and (2) whether section 5’s “disparate geographic coverage is sufficiently related to the problem it targets.”<sup>106</sup> The first question relates to the overcoming weight of history as well as coercive burdens (conditionality) and the second question deals with overcoming disparate treatment (selectivity). The court moved both questions to section 4’s coverage formula rather than the practice of preclearance. According to Peter Onuf, descendants of White southerners are more likely to decry the end of slavery and segregation, “rather than the fact that these requirements were also imposed through the readmission conditions.”<sup>107</sup> It actually seems like the opposite is true: since many of these issues have long been off the table, using “post-racial” rhetoric, the fact of continuing “conquest” (selectivity and conditionality) have become the main sites for struggle. There are legalist and populists strands of this rhetoric and they sometimes converge. Perhaps “equal sovereignty” were serve as new galvanizing norm, drawing the energies of those who would champion state sovereignty, but find few openings within the mainstream of constitutional doctrine.<sup>108</sup>

### 1. Critique of Conditionality: The VRA Wrongfully Coerced States

The first critique that can be traced from opposition to the VRA context back through its precursors is that this form of federal regulation wrongfully coerces states with burdensome conditions. Justice Black objected to the provisions of the VRA “which force[d] any one of the states to *entreat federal authorities in far-away places* for approval of local laws before they can become effective” He went on to say this is “to create the impression that the State or States treated in this way are little more than conquered provinces.”<sup>109</sup> More recently the Cato Institute’s amicus brief in *Shelby* claimed “[t]he VRA effectively put southern states under federal electoral receivership.” Aside from the selectivity, the idea of undue burdens being

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those jurisdictions”).

<sup>106</sup> *Nw. Austin*, 557 U.S. at 203.

<sup>107</sup> Peter S. Onuf, *New State Equality: The Ambiguous History of a Constitutional Principle*, 18 *PUBLIUS* 53 (1988); William A. Dunning, “*Are the States Equal Under the Constitution?*” 3 *POLITICAL SCIENCE QUARTERLY* 425-453 (1888).

<sup>108</sup> MARK R. KILLENBECK (ED.), “THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES” (2001).

<sup>109</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 360 (1966) (Black, J., dissenting).

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placed upon any state, tracks cultural memories and representations of conquest. Either as a product of a longer cultural memory, or simply a glib analogy, the preclearance and even bailout provisions would be reminiscent of loyalty requirements, and conditionality for full sovereignty.

The point, however, is that the VRA should be punitive, or at least sufficiently coercive to deter the conduct it is designed to deter.

**2. Critique of Selectivity: The VRA Invidiously Targeted  
Particular States**

The second objection is the historical and geographic specificity of the states being treated as “conquered provinces.” Earlier arguments in the contending narratives also pointed to ‘selectivity’ by charging the Union, and later the Federal government, not with domination or elitism, but with hypocrisy.<sup>110</sup> In this view, each successive effort has been marred by selectivity. The same measures opponents of the VRA (and before it, the Reconstruction amendments) would call “hypocritical” or “selective,” however, its defenders would call proportional and narrowly-tailored. Among those who views selectivity as a virtue is Akhil Amar, who connects the VRA to the longer history:

Congressional Republicans openly admitted that many Northern states also had imperfect track records, but these congressional leaders insisted that Article IV authorized the federal government to draw sensible lines targeting the worst state offenders. In 1866, most Northern states disfranchised blacks, but because free blacks constituted a significantly higher percentage of the population of the former Confederacy, it was not unfair — on the contrary, it was necessary and proper — for Congress to target these worst-offending states and to administer to these states specially strong medicine that limited their previously unfettered and previously abused freedom over voting laws.<sup>111</sup>

On the other hand, viewing the same history “[o]pponents cried foul in the name of federalism, states’ rights, and equal treatment for all states.”<sup>112</sup>

Unlike Amar, who candidly approves of such “specially strong medicine,” other defenders of the VRA would deny that it has ever been

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<sup>110</sup> JUDITH N. SHKLAR, *ORDINARY VICES* (1985).

<sup>111</sup> Akhil Amar, *The Lawfulness of Section 5 — and thus of Section 5*, 126 HARVARD L. REV. FORUM 109, 113 (2013).

<sup>112</sup> *Id.*

either targeted or punitive. Pointing to a facially neutral coverage formula (it did not mention states, though it did refer to conduct and dates), supporters of Article 5 regime could say supported its continuation not to humiliate or stigmatize the twice-defeated South, but to deter future discriminatory practices. Indeed, the covered jurisdictions were not identical to the Confederacy, or the Jim Crow South, or even limited to the geographical southern states. It was about other struggles as well, such as the struggle for inclusion by linguistic minorities into full and meaningful participation. Those who wish to emphasize the facial neutrality of the coverage formula could emphasize the inclusion of the counties that overlap with the boroughs of New York City, to show that the formula was neither about Red and Blue states, nor the old Blue and Grey. Parts of New York California, and Texas were covered because they have significant populations of linguistic minorities, and Alaska and Arizona have continued to be covered for the same reason.

For others on both sides of the question, history was crucial. Most defenders of the formula, including the dissent in *Shelby County*, characterize the coverage formula as targeted but not punitive.<sup>113</sup> “There is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting.”<sup>114</sup> The targeting is as often described in facially neutral terms as it is historically contextualized. “Consideration of this long history, still in living memory, was altogether appropriate.” Preclearance was “a procedure which, while not always burdensome, nevertheless was viewed by many as an “important political symbol” by local officials: “a vivid stigma recalling the sins of past generations.”<sup>115</sup> Even if Section 4 was not exclusively about re-fighting the Civil War or even the civil rights movement, it imported gained the force of principle from association with these struggles. More than the dissent, though, it is the majority (starting in *Northwest Austin* and continuing through the oral arguments in *Shelby County*) that kept whistling Dixie despite its stated position that no

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<sup>113</sup> The website of the civil rights coalition the Leadership conference, asks and answers the question “Because of its limited application, is Section 5 used to “punish” certain states?” by saying “Section 5 is not punitive; it prohibits discriminatory changes affecting the right to vote. The Voting Rights Act has no provisions that name particular states or areas. Section 5 is aimed at a type of problem, not a state or region.” On the other hand, the “It is designed to prevent backsliding” Congress therefore included the Section 5 preclearance provision to prevent the implementation of new discriminatory laws. The objections made since 1965 showed the covered jurisdictions have attempted to use gerrymandering and other forms of discrimination to abridge the right to vote. Section 5 has focused on these efforts. “Voting Rights Act Frequently Asked Questions”, <http://www.civilrights.org/voting-rights/vra/faq.html#question6>.

<sup>114</sup> *Shelby Cnty. v. Holder*, 133 S.Ct. at 2642.

<sup>115</sup> Thomas M. Boyd and Stephen J. Markman, *The 1982 Amendments To The Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1427 (1983).

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state or region should be stigmatized. Supporters of the VRA should have been more forcefully committed to the idea that both selectivity and conditionality were appropriate. The point is that the VRA should be punitive, or at least sufficiently coercive to deter the conduct it is designed to deter, and targeted enough to accomplish what the Fifteenth Amendment demanded of states.

**3. The Expressive and Instrumental Functions of State  
Dignity and State Equality**

What is the actual advantage of referring to “equal sovereignty” and not just “state sovereignty” as it more familiar in federalism debates? Certainly a reinvigorated notion of states’ rights fits well with other jurisprudential strands as well a stream of right wing populism and literature that is helping to shape contemporary politics. In its form “sovereignty” is analogous to “liberty” not to “equality” and therefore the role of concepts like “equal sovereignty of states” is not self-evident to those engaged in federalism debates. Instead what is generally at stake in these debates is the freedom of the states vs. the federal government to legislate, adjudicate, regulate or act as they please is generally what is at stake. The Supremacy Clause settles some of these issues, and others remain open.<sup>116</sup> To introduce a term like “equality” into the characterization of states as sovereigns requires an additional argument, additional evidence, and an additional motivation.

In the modern context, insofar as there are still territorial entities vying for statehood, the concept of equality of statehood may not be meaningless. Residents of Washington D.C. or Puerto Rico contend with second-class status in terms of representation, some within these areas aspire to statehood, understanding that such a status mediate protections of status, and full citizenship. Here, statehood within a republican form of government would itself be the prize, and not the fear of being denominated a second-class state. Thus, what the actual “equal footing” doctrine would accomplish in this context is far from clear.<sup>117</sup> Also, if “statehood” is the

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<sup>116</sup> Nina Markey, *The Political Boundary Requirement of Article IV, Section 2, Paragraph 3 of the New Jersey Constitution Must Be Breached in Order to Comply with the Voting Rights Act and the Supremacy Clause*; 35 RUTGERS L.J. 1375 (2003-2004);

<sup>117</sup> Javier J. Rua Jovet, *The Fourth Option: Modern Self-Determination of Peoples and the Possibilities of U.S. Federalism*, 49 REV. DER. P.R. 163 (2009-2010); the footing argument occupied one side of a continuum in a discourse on loyalty for newly admitted states: Eric Biber, *Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, The; 46 Am. J. Legal Hist. 119 (2004). It also has implications for choice of law principles, and full-faith and credit laws. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The*



protected classification, how does the doctrine apply to the diversity of covered jurisdictions, which are municipal entities of all types?<sup>118</sup> Covered jurisdictions need not even be states.

The move to equality accomplishes more than the expressive function. If the function of equal sovereignty is limited to an expressive function, it might play a role in galvanizing political movements. The expressive function supports an instrumental one. For example, consider the mediating concept of state dignity evident in oral arguments (where Justice Kennedy referred to the “equal dignity” of sovereigns).<sup>119</sup> “Equal dignity” of states brings “sovereign equality” discourse a little closer to the concerns of federalism debates and the states’ rights concerns that emanate from the Tenth Amendment and Article IV of the Constitution. But the value of “equality” is instrumental and not only expressive. As I argue below, the “misrecognition” of this doctrine is crafted in order to accommodate contemporary demands for states’ rights, and implicit in the analysis is a new standard of review.

### III. EXPERIMENTING WITH EQUALITY: HEIGHTENED SCRUTINY AFTER *SHELBY COUNTY*

If it is taken seriously as a legal doctrine, then it might inch away from its narrow role as an “equal footing” standard, and aspire towards a kind of “equal protection” argument available to states. This possibility was explicitly rejected in *Katzenbach*, which also dealt with ingenious attempts by South Carolina to extend due process and bill of attainder protections to states.

The instrumental accomplishment of *Shelby County* is that under any successor to the VRA, or any similar legislation, differential treatment of covered and non-covered jurisdictions must be subject to heightened scrutiny. Though the Court never explicitly defines their standard of review, it is not strict scrutiny, but certainly heightened, taking away some deference from an ordinary rational basis standard, and focusing on differential treatment of states. In what until now has been an entirely different site for applying such

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*Constitutional Foundations of Choice of Law*, 92 COLUM. L.REV. 249 (1992). None of these, however, exempt states from Federal civil rights legislation.

<sup>118</sup>For a comparison of states and other municipal units, see Allan, Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1 (2011).

<sup>119</sup> But conceptions of dignity are also plural, and multiply among all the subjects and sovereigns who claim it. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1933-58 (2003) (discussing this sovereign conception of state dignity and contrasting it with other conceptions of dignity operative in our law); see also Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 192-99 (2011).

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scrutiny, “disparate treatment” can be challenged under equal protection analysis, which requires heightened scrutiny for laws discriminating against discrete and insular minorities. The notion that states qualify for equal protection was rejected out of hand by the court in *Katzenbach*, along with the applicability the narrower doctrine that new states enter the Union on an equal footing with their predecessors as articulated under *Coyle v. Oklahoma*.

**1. Boerne Again?: Does *Shelby County* Inaugurate a New  
Standard of Review?**

While silently over-turning *Katzenbach*’s clear statement on the inapplicability of the equal footing doctrine, the court side-stepped several important questions, including the applicable standard of review. Many commentators found this anti-climactic, and others seemed either relieved or disappointed that the heightened test from *Boerne* was not explicitly applied, and still believe the Court will have to address whether Section 2 of the Fifteenth Amendment is subject to deferential “rational basis” standard set forth in *Katzenbach* or the more demanding one from *Boerne*.

In the wake of *Shelby County*, one of the most important lingering questions is whether the Court has imported the heightened standard of scrutiny for Section 5 of the Fourteenth Amendment (congruence and proportionality from *Boerne v. Flores*) to Section 2 of the Fifteenth Amendment. It might have seemed so. The Thirteenth, Fourteenth, and Fifteenth Amendments each conclude with nearly-identically-worded sections giving Congress powers to enforce the Amendment “by appropriate legislation”<sup>120</sup> The Court has found that each section should be interpreted similarly, unpacking “appropriate” to mean “congruent and proportional.” In a line of cases starting with *City of Boerne v. Flores*, the Supreme Court the mid-1990s had begun to limit the power of Congress to enforce the guarantees of the Civil War Amendments, crafting a “congruence and proportionality” test to assess the constitutionality of congressional efforts to enforce the Fourteenth Amendment.<sup>121</sup> In *Boerne*, using this test, the Court struck a balance, reaffirming the power of Congress to enact prophylactic rules to protect established constitutional guarantees while striking down efforts to provide additional guarantees not properly rooted in the Constitution. What has been seen in subsequent cases Congress had to be

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<sup>120</sup> Thirteenth Amendment, §2; Fourteenth Amendment, §5; Fifteenth Amendment, §2.

<sup>121</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 637 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Coleman v. Maryland Court of Appeals*, 132 S. Ct. 1327 (2012).

enforcing actual constitutional guarantees – there must be a “congruence and proportionality” between the injury to be prevented or remedied and the means adopted to that end – but once it was, the Court recognized that Congress had wide latitude to act.<sup>122</sup> That balance allowed the Court to limit the reach of federal age and disability discrimination laws and, most recently, the Family and Medical Leave Act.<sup>123</sup> On the other side, certain commentators while recognizing *City of Boerne v. Flores* and its progeny have effectively limited Congress’s Fourteenth Amendment powers via doctrines of “congruence” and “proportionality,”<sup>124</sup> insist this is not necessary in the Fifteenth Amendment context, which is already constrained to the area of voting rights.<sup>125</sup> Insofar as the Fifteenth Amendment “amended” and therefore “trumps” the Tenth Amendment.<sup>126</sup> And, while it is generally true that states retain broad powers to regulate elections, the Fifteenth Amendment modified those powers with respect to denying or abridging voting rights based upon race or color. Even strictly construed, Fifteenth Amendment describes Congress’s power to ensure the right to vote regardless of race or color as plenary. As such, the Tenth Amendment is inoperative to prevent or limit Congress’s authority to legislate these matters.<sup>127</sup> The Court in *Boerne* was concerned that Congress might invent constitutional rights in the guise of enacting enforcement legislation. That concern does not have any force when it comes to the Fifteenth Amendment’s focused and express prohibition on racial discrimination in voting.<sup>128</sup> Most commentators believe the application of *Boerne* would have established a less deferential standard based on congruence and proportionality. (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may

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<sup>122</sup> See e.g., *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 727-28 (2003) (“Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”); *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (explaining that “Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions”).

<sup>123</sup> *Kimel*, 528 U.S. 62; *Garrett*, 531 U.S. 356; *Coleman*, 132 S.Ct. 1327.

<sup>124</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>125</sup> Akhil Amar, *The Lawfulness of Section 5 — and thus of Section 5*, 126 HARVARD L. REV. FORUM 109, 120 (2013).

<sup>126</sup> Paul Abrams, “*The Fifteenth Amendment Trumps the Tenth Amendment on Voting Rights*,” HUFFINGTON POST, July 1, 2013, [http://www.huffingtonpost.com/paul-abrams/the-Fifteenth-amendment-trumps\\_b\\_3527256.html](http://www.huffingtonpost.com/paul-abrams/the-Fifteenth-amendment-trumps_b_3527256.html).

<sup>127</sup> In the context of the Fifteenth Amendment, we need not settle the ongoing Tenth Amendment controversies over “enumerated powers” those “expressly granted” and that Congress has great latitude employing the “necessary and proper” clause.

<sup>128</sup> Fifteenth Amendment only provides limited authority for Congress to ban discrimination in voting, and the Court may have wanted to examine whether Congress’s powers to mandate voter equality are broader under the Fourteenth Amendment, which guarantees legal equality.

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become substantive in operation and effect”).<sup>129</sup>

Yet the majority did not even cite *Boerne*,<sup>130</sup> possibly as not to attract vigorous dissent, or so the serious problems with equal sovereignty would pass under the radar. Critics of the opinion can take some relief that they did not add another case to the *Boerne* line of cases, even as they are frustrated that *Katzenbach* is being abandoned piecemeal. But there is another possibility. In my view, it might be a false choice between *Boerne* and *Katzenbach* and the moment for choosing has already passed. Indeed as the Court of Appeals in *Shelby County* noted, *Boerne* itself “relied quite heavily on *Katzenbach* for the proposition that section 5, as originally enacted and thrice extended, was a model of congruent and proportional legislation.”<sup>131</sup> Instead, by declining to use either test, the Court is signaling that embedded somewhere in *Northwest Austin* or *Shelby County* itself, there is a new test being fabricated for the purposes of the Fifteenth Amendment and Voting Rights jurisprudence. *Northwest Austin* was known until *Shelby* as a case that avoided all constitutional issues, and yet the *Shelby County* court relies on it heavily, not only for a substantive doctrine but also a standard of review.<sup>132</sup> Since Constitutional avoidance was so central to the holding, *Shelby* will quickly displace it as setting both the terms of the equal sovereignty doctrine (overturning *Katzenbach* and resurrecting *Coyle*) and the standard of review for future cases (overturning *Katzenbach* and cloning *Boerne*). The Court has held that principles of federalism place limitations on the Fourteenth Amendment in *Boerne*. *Shelby County* could be seen as the Fifteenth Amendment analog to *Boerne*, but it inaugurates a test that stands alone. This might be more damaging to Congress’s power under the Fifteenth Amendment than either *Boerne* or *Katzenbach*, which represent a continuum of rational and proportional, but do not pretend to model their tests on a kind of equal protection analysis.

It might be predicted that *Shelby* will be to the Fifteenth Amendment what *Boerne* was to the Fourteenth Amendment, and certainly each case articulates a principle of federalism placing limitations on regulatory statutes justified under the respective amendments. But this discourse is no longer

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<sup>129</sup> *Boerne*, 117 S.Ct. at 2164.

<sup>130</sup> Richard Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG, Jun. 25, 2013, <http://www.scotusblog.com/2013/06/the-curiousdisappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/>.

<sup>131</sup> *Shelby Cnty v. Holder*, 679 F.3d 848, 859 (D.C. Cir. 2012) *rev’d*, 133 S.Ct. 2612 (2013) and *vacated and remanded* 541 F. App x 1 (D.C. Cir. 2013).

<sup>132</sup> As Rick Hasen noted, though the Court flagged the issue in *Northwest Austin*, CJ Roberts ignored *Boerne*, except for a single sentence: “Both the Fourteenth and Fifteenth Amendments were at issue in *Northwest Austin* . . . and accordingly *Northwest Austin* guides our review under both Amendments in this case.”

about federalism, the structure of the relationship between the states and the federal government, and the details of shared sovereignty. It is about treating states as protected “persons” to some degree. What is new, even to equal footing doctrine, is that the Court is suddenly applying tiers of scrutiny to regulatory statutes that facially discriminate between states in almost precisely the same way they would conduct an equal protection analysis.<sup>133</sup> No previous articulation of the equal footing doctrine actually supports the idea that “otherwise valid federal legislation treating states unequally is suspect.”<sup>134</sup> For that, the Court would have to own up to what it is doing, it is not cloning the *Coyle* doctrine, or doing conducting a “equal footing” analysis, it is conducting something more like an equal protection analysis: it is treating states as protected “persons” to some degree, and without a clear source for this test, applying tiers of scrutiny to regulatory statutes that facially discriminate between states in almost precisely the same way they would. Though the court does not go as far as to apply “equal protection” to states (a still implausible mutation of doctrine) they carve out the possibility of engaging in the same kind of inquiry. Though the use of the term “equal protection” would have alerted us to the far-reaching ambition of the judgment, the court was careful to appear as though they were drawing upon a well-settled principle. But the pragmatic requirements of moderation were exceeded only insofar as the majority also wished to engage in a kind of expressivity: thus the rather pedestrian sounding “equal footing” doctrine was referred to as “equal sovereignty among states.”

## 2. Cloning *Coyle*: Is this Equal Sovereignty a Hybrid of Equal Protection?

Guarding against the possibility of a novel heightened standard of scrutiny, Ginsburg said: “Faced with subsequent reauthorizations of the VRA, the Court has reaffirmed [the *Katzenbach*] standard.”<sup>135</sup> “Today’s Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed “rational means.”<sup>136</sup> This was

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<sup>133</sup> Gerard Magliocca, “An Equal Protection Clause for the States,” CONCURRING OPINIONS (blog), <http://www.concurringopinions.com/archives/2013/08/an-equal-protection-clause-for-the-states-2.html>. (Last checked December 11, 2014). (asking whether “the Court is now applying tiers of scrutiny to regulatory statutes that facially discriminate between states.”)

<sup>134</sup> Zachary Price, *Shelby County v. Holder: The Voting Rights Act Doesn’t Need to Treat States Equally*, SCOTUSBLOG (Feb. 16, 2013, 2:23 AM), <http://www.scotusblog.com/2013/02/shelby-county-v-holder-the-voting-rights-act-doesnt-need-to-treat-states-equally/>.

<sup>135</sup> *Shelby Cnty. v. Holder*, 133 S.Ct. 2612 (Ginsburg, J., dissenting) (citing *South Carolina v. Katzenbach*, 383 U.S. at 324).

<sup>136</sup> *Shelby Cnty. v. Holder*, 133 S.Ct. 2612 (Ginsburg, J., dissenting) (citing *e.g.*, *City of Rome*, 446 U. S. at 178).

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blocking *Boerne* but also expressing skepticism about any stealth standard that might have been applied. The Court reaches this less deferential standard without even using *Boerne*. We can now assume that were there an amendment of the VRA, with a new coverage formula, this test would be repeated and heightened, less deferential rational basis test, where disparate treatment is detected, the Court will demand a tighter fit between the coverage formula, which states are included and which are excluded, and the locations of voting rights violations.<sup>137</sup> If the holding is not limited to facial discrimination, but also how regulatory statutes are applied, the Court might also be called upon to apply such a test to the remaining sections of the VRA, including section 5 if it is “applied” in a “discriminatory” manner. Justice Ginsburg points out that the majority’s “unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief.” Will the holding of *Shelby County* be expanded to include all regulatory statutes that facially discriminate between states, as Justice Ginsburg worried about in her dissent? Perhaps a law exempting some states from its regulatory requirements without any explanation would at least raise questions under rational basis review. But the VRA set out its formula explicitly. And yet the Court held that the record amassed by Congress when the Voting Rights Act was renewed in 2006 was insufficient to justify that facial discrimination between the states. So it is not merely about rational basis at all. Why was that evidence inadequate? Is there a reason to distinguish Congress’s power pursuant to the Commerce Clause from its powers under the Reconstruction Amendments? Or is there something special about state authority over voting that calls for more demanding judicial scrutiny?

What are the consequences of the Court’s “expansion of equal sovereignty’s sway?”<sup>138</sup> It depends, on which “past” (and which precedent) “is prologue.”<sup>139</sup> “To speak of a decision as “unprincipled” is typically to say that a court gave as a reason for a thus suggesting that the reason given by the court was not really a reason it took very seriously.”<sup>140</sup> That may very well be

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<sup>137</sup> Joey Fishkin, *The Way Forward After Shelby County*, BALKINIZATION, 8:07 PM E.S.T. (June 25, 2013) available at <http://balkin.blogspot.in/2013/06/the-way-forward-after-shelby-county.html>. (Fishkin calls the test the court implicitly applied “rational basis with a bite,” squaring the characterization with the result, deducing that it was the “language in the opinion suggesting that the coverage formula is *simply irrational*” that was fatal when applied to “a statute enacted by Congress and supported by a 15,000 page record, described at length in the dissent, *would ordinarily pass rational basis review*.”) (emphasis added).

<sup>138</sup> *Shelby Cnty v. Holder*, 133 S.Ct. 2612 (Ginsburg, J., dissenting).

<sup>139</sup> Justice Ginsburg quotes W. SHAKESPEARE, *THE TEMPEST*, act 2, sc. 1 to say “the past is prologue” to suggest that the past behavior of states will predict their future behavior. I am suggesting here that the court might not even be this reliable or predictable.

<sup>140</sup> FREDRICK SCHAUER, *THINKING LIKE A LAWYER* 178. See M. P. Golding, *Principled Decision-*

the case here. The best evidence for this will be whether the court chooses to follow this reasoning in future cases. “Federal statutes that treat States disparately are hardly novelties.”<sup>141</sup> Congress routinely passes legislation – earmarks, pilot projects, the management of federal property, involving local emergencies or contingencies- that presumes that only some rational basis is necessary for unequal treatment of states. It will be surprising if opponents of some of these legislative efforts will not now find their courts. But it will also be surprising if the court is now committing itself to apply a heightened scrutiny test in all such cases.

#### IV. CONCLUSION

It remains to be seen whether the doctrine will remain an isolated for a particular result, or whether it is a part of a broader expressive turn in the area of states’ rights.

Here, and perhaps in the future, “equal sovereignty” functioned as a heightened scrutiny test, albeit one that was not applied explicitly and this may be an incremental step towards developing this test in other areas. Of all the purposes and principles that could be served, the emphasis “equality of states” was an eccentric one. It remains to be seen whether the liberties the majority has taken to overcome history, precedent, and logic are merely prologue to a wider effort to resurrect moribund states’ rights doctrines. But on the back of the narrower concept “equal footing doctrine” as well as a set of doctrines, the court is crafting alongside the “proportionality and congruence” limits on the Fourteenth Amendment, a heightened scrutiny for laws enforcing the Fifteenth Amendment, and may be intended as a new galvanizing norm, drawing the energies of those who would champion state sovereignty as a matter of dignity or strategy.

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*making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

<sup>141</sup> *Shelby Cnty. v. Holder*, (Ginsburg, J., dissenting) (“See e.g., 28 U. S. C. §3704 (no State may operate or permit a sports-related gambling scheme, unless that State conducted such a scheme “at any time during the period beginning January 1, 1976, and ending August 31, 1990”); 26 U.S.C. §142(l) (EPA required to locate green building project in a State meeting specified population criteria); (at least 50 percent of rural drug enforcement assistance funding must be allocated to States with “a population density of fifty-two or fewer persons per square mile or a State in which the largest county has fewer than one hundred and fifty thousand people, based on the decennial census of 1990 through fiscal year 1997”); §§13925, 13971 (similar population criteria for funding to combat rural domestic violence); §10136 (specifying rules applicable to Nevada’s Yucca Mountain nuclear waste site, and providing that “[n]o State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987”).

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Are we bound to dignify the court's use of "dignity," accept their equivalence between notions of "equality"? Another concern is whether we believe this application of the terms cheapens the realms to which such concepts are properly attached. A philosophical argument that extends rights, dignity, equality and sovereignty to states on one side, and parallel entitlements to individuals on the other<sup>142</sup> may not be resolvable by reference to moral philosophy, but as a constitutional matter it is much simpler.<sup>143</sup>

Opponents of the *Shelby* decision may take some comfort that the court may have been cynical in reaching its result. If so, the damage can be limited. One concern may be, as a legal matter, how serious is the court itself, is the reason given a reason it took very seriously." That may very well be the case here. The best evidence for this will be whether the court chooses to follow this reasoning in future cases. In defending the idea that states who have acted badly in the past might be expected to do so in the future. It remains to be seen whether the liberties the majority has taken to overcome history, precedent, and logic are merely prologue to a wider effort to resurrect moribund states' rights doctrines.

Though the VRA survived a constitutional challenge,<sup>144</sup> each time it was amended,<sup>145</sup> there remained an undercurrent of discontent and an intuition, articulated through any number of constitutional provisions and quasi-constitutional arguments, that the law posed a significant intrusion on state sovereignty. Before *Shelby v. Holder*, there remained nine states, and local governments in seven other states<sup>146</sup> that were required to get permission from the Justice Department or a Federal Court before they could

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<sup>142</sup> Garrett Epps, *Voting Rights Act Case Pits the Rights of Humans Against the 'Sovereignty' of States*, THE ATLANTIC MONTHLY (Feb. 24 2013).

<sup>143</sup> There is a convincing literature on the revolutionary effect of the Reconstruction Amendments on American law and society. How the court did not take on the Reconstruction amendments head on without being (or remaining) on the losing side of history? The answer may be as simple (and ironic for popular sovereignty movements) as a 5-4 majority.

<sup>144</sup> *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterrey County*, 525 U.S. 266 (1999).

<sup>145</sup> See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314.

<sup>146</sup> The jurisdictions most recently covered by section 5 are the states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, counties in California, Florida, New York, North Carolina, and South Dakota, and townships in Michigan and New Hampshire. See 28 C.F.R. pt. 51 app. at 100-01 (2009). See Civil Rights Division, U.S. Department of Justice, Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.php](http://www.usdoj.gov/crt/voting/sec_5/covered.php).



change any law dealing with voting. Might the Court's protection of state dignity be justified as an "effort to reinvigorate a long-dormant cultural attitude... an affinity and respect for state government-- that would promote the structural values of federalism in today's world?"<sup>147</sup> More optimistically, the dialectic of conquest may be coming to an end, and the narrative of political unification may finally be one that the formerly stigmatized states will now adopt.<sup>148</sup> Unfortunately after giving so much lip service to stigma and dignitary rights, and entering the mainstream, the formerly covered jurisdictions have been poised to repeat history and pass laws regressing from the goals of wider enfranchisement.

The court has not outrun the narratives that have shaped the discourse up to this time. They might have believed that by relieving states of historical burdens, they would transcend the conflicts that shaped that history. At the time the VRA was passed, it made sense to focus on "bad actors" (through a section 4 "coverage formula") and to put a burden on these past offenders to demonstrate their proposed laws would not discriminate (through section 5's pre-clearance procedures).<sup>149</sup> For now it is unclear how the purposes of the Act will be enforced.<sup>150</sup> Redemption and inclusion are not likely at hand. Even in a world where Articles 4 and 5 are no longer available, the basic struggle for political participation remains, and with other forms of enforcement and federal oversight (Justice Department or Article 2), and so the two narratives will remain antagonistic for the time being.

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<sup>147</sup> See also Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001).

<sup>148</sup> AMITAI ETZIONI, *POLITICAL UNIFICATION* (1965).

<sup>149</sup> This originally applied to states that had used a discriminatory voting law or method that was in effect in November 1964. More recently, the formula was changed to key it to the situation as of 1972.

<sup>150</sup> Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131 (2013), <http://yalelawjournal.org/2013/06/07/charlesfuentesrohwer.html>; Heather Gerken, "A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach" (August 22, 2005). Harvard Public Law Working Paper No. 118. Available at SSRN: <http://ssrn.com/abstract=788067> or <http://dx.doi.org/10.2139/ssrn.788067>.